CONSTITUTIONAL AND STATUTORY AUTHORITY

TO CONDUCT

FOREIGN INTELLIGENCE ACTIVITIES

*Authority for Activities Relating to Collection of Foreign Intelligence

*Authority to Engage in Covert Operations

*Limitations on the Authority to Reorganize the Civilian Intelligence Community

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Legal Research Project for
The Coordination Staff of the
Intelligence Community Staff

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CONSTITUTIONAL AND STATUTORY AUTHORITY TO CONDUCT FOREIGN INTELLIGENCE ACTIVITIES

I. INTRODUCTION.

This research study was made at the request of the IC Coordinating Staff and based on a recommendation by the General Counsel. It is divided into three parts:

A- Authority for Activities Related to the Collection of Foreign Intelligence.

B- Authority to Engage in Covert Operations.

C- Limitations on the Authority to Reorganize the Civilian Intelligence Community.

Each of these subjects is treated separately. Neither the text nor the references include classified information.

The conclusions reached were based on present knowledge of intelligence operations. It is conceivable that some of the conclusions may have overlooked some aspects of the practical functioning of intelligence operations and, therefore, may require further study.

We are confident that the case law in the field has been exhausted. It should be noted, nevertheless, that there are very few cases dealing precisely with the issues discussed in this paper. However,

the cases played an important part in arriving at the conclusions, and our supporting views are based, in large part, on the rationale of some of the leading decisions, particularly those which involve Presidential powers.

It can be expected also that the issues discussed in this paper will suggest others on which research may be desired. Other topics which may be considered as additional research projects are the following:

1. Jurisdictional problems in conducting domestic intelligence activities;

2. Scope of authority to protect sources and methods;

3. Fourth Amendment problems in connection with domestic intelligence activities;

4. Limits on CIA authority to conduct investigations and other similar activities within the United States;

5. Limitations on covert operations under international law;

6. Authority of CIA to assist other Federal agencies in carrying out their responsibilities;

7. Nature and scope of the confidentiality of CIA records;

8. Legal responsibilties of CIA and its employees for lawful conduct within the U.S..

II. ANALYSIS OF SOME OF THE ISSUES.

1. The Nature of Presidential Powers.

The nature and scope of Presidential powers relating to foreign affairs are difficult to determine. The few references to such powers in the Constitution offer little guidance and court decisions are not too helpful, tending to keep within the narrow limits of the issues.

The clauses in Article II of the Constitution do not articulate the powers of the President in conducting foreign affairs, formulating and implementing foreign policy, and taking the steps necessary to safeguard national security. Some authorities contend that the Constitution contemplated that the President should possess the sovereign power which the founding fathers intended to vest in the Federal Government as a whole. Whatever sovereign power that exists in the national government for conducting foreign affairs is distributed among the three branches, and the theory that the President has unrestricted sovereign power to act exclusively and independently in foreign affairs cannot be supported. 1/

The problem of ascertaining the true nature of the President's powers is made particularly complex because the Constitution has divided responsibility for foreign affairs between the President

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1. See e.g. "Foreign Policy and the Constitution", 61 Va. Law. Rev. 751, 753 (1975).

and Congress. The President negotiates a treaty; the Congress ratifies it. The Congress declares war; but the President prosecutes it. Since there is no explicit allocation of authority between the two branches of government, it remains uncertain as to which branch has authority to determine U.S. foreign policy and under what circumstances both branches must share in its formulation.

Traditionally, Congress makes the laws and the President executes them. If our Constitution required a strictly functional separation of powers, Congress would have the responsibility of making foreign policy and the President of enforcing it. But this concept has been rejected by history, and we have followed the general tradition of recognizing the authority of the President to "legislate" foreign policy and Congress to legislate in domestic affairs. On the few occasions the Supreme Court has reviewed the scope of the President's powers in foreign affairs, it has tended to avoid any ruling that offers much assistance in ascertaining the limits of the scope of such powers. In the Curtiss-Wright case 2/, the court seemed to endorse the proposition that the President had inherent authority to legislate foreign policy. However, in Youngstown 3/, the court seemed to favor a "natural" division of powers between Congress and the President, allocating those

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2. United States v. Curtiss-Wright, 299 U.S. 304 (1937)

3. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)

which are inherently "executive" to Congress. Whether the rule in Youngstown will be applied broadly to foreign affairs, or restricted to the domestic aspects of foreign policy, has not yet been decided.

Acceptance of the view that Congress and the President share authority in the field of foreign affairs belies any conclusion that the President possesses unrestricted inherent power. Moreover, to adopt the principle of the exclusive primacy of Presidential powers in foreign affairs is to ignore the doctrine of separation of powers. Therefore, an analysis of Presidential authority in that area must take into account the statutory framework which Congress established under its power to legislate. 4/

2. Presidential Power and Intelligence Activities.

The power of the President to collect foreign intelligence affecting our national security need not rest exclusively on a Congressional delegation of authority. The existence of such authority can be supported by the President's authority as Commander-in-Chief to acquire intelligence for use in making military decisions necessary for protecting our national security. 5/ This is reinforced by Congressional policy as articulated in the NSA.

There is support for the view that the responsibilities of the

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4. Unlike Article II which states that: "The Executive Power shall be vested in a President...", Article I states that "All legislative powers herein granted shall be vested in a Congress..." (underscoring added).

5. Totten v. United States, 105 U.S. 106 (1875)

President for conducting foreign affairs vests an inherent authority in him to collect intelligence necessary to intelligently carry out his responsibility. This is based on the proposition that the manifestly complex nature of foreign policy decisions requires that the President obtain information to aid him in formulating foreign and domestic policy. In discussing Presidential authority as related to executive privilege, the Supreme Court in United States v. Nixon 6/ stated that "certain powers and privileges flow from the nature of the enumerated powers." Therefore, the authority of the President to collect foreign intelligence without legislative authority either can be implied from an enumerated power or it can be based on the power of the President to conduct foreign affairs and to formulate foreign policy. It may be concluded, therefore, that the mere collection of intelligence to assist in formulating foreign policy needs no supporting legislation. 7/

3. Authority to Conduct Covert Operations.

There has never been any doubt as to the President's power to use whatever means, covert or otherwise, to meet the threats of war or national emergency. The authority is inherent under his power as Commander-in-Chief. When the President is not acting under his authority as Commander-in-Chief during times of war or national emergency, his authority to conduct covert operations involving

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6. 418 U.S. 683, 705 (1974)

7. This is not to imply that if Congress legislates with respect to the collection of intelligence, the President can still act independently of the legislation.

political or military force directed at foreign governments and their leaders must be based on what is appropriately described as his "residual" power. This power includes the authority to conduct foreign affairs and the primary responsibility for safeguarding our national security from foreign threats. However, because it does not fall within one of the President's enumerated powers giving him an independent source of power, the authority to conduct foreign affairs and to safeguard the national security must be shared by him with Congress.

The right of a nation to act in order to protect its national security is based upon the rule of international law which recognizes the sovereign right of self preservation. But under our system of government, authority to take action to safeguard our national security does not rest in the President alone.

Until the enactment of the Foreign Assistance Act of 1974, there was serious doubt that the CIA had authority to engage in covert operations involving the use of political and military force against, or in support of, a foreign government or its leaders. Such operations involve the implementation of foreign policy -- a power which would be difficult to support as having been delegated to the CIA, the NSC, or the President by the National Security Act. Most of the duties delegated to the CIA under that Act are ministerial and do not involve policy making or policy implementation in the field of foreign affairs.

Using covert operations to implement foreign policy within the context discussed herein, independent of any Congressional grant, affects the equilibrium sought by the framers of the Constitution in providing for the separation of governmental powers. If this authority were recognized as independently existing in the Executive Branch, it would permit the President to secretly "legislate" foreign policy and then secretly execute it, using covert means in so doing.

It has been suggested that the special authority given to the National Security Council in section 102(d)(5) of the Act 8/ to authorize "other functions and duties" provides the necessary authority for CIA to conduct foreign covert operations. Any such interpretation would strain the literal meaning of the language used. The "other functions and duties" which the NSC may assign are limited to those "relating to intelligence affecting the national security". It would be difficult to support the view that the implementation of foreign policy by the covert use of political, economic, or military force is related to the collection, evaluation or dissemination of intelligence.

Any question as to whether the President can authorize covert operations has now been removed by the enactment of the Foreign Assistance Act of 1974. 9/ Section 662 of that Act limits the authority of the President to use appropriated funds for conducting

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8. 50 U.S.C 402(d)(5)

9. Public Law 93-559 (1974)

CIA covert operations in foreign countries, other than those relating to intelligence collection, unless he makes a finding that each such operation is important to national security and reports such finding to Congress.

There are two ways to view this section. One view is to construe it as making an affirmative grant of power to engage in foreign covert activities. Another view is to construe it as placing a limitation on authority that is presumed to already exist in the President, the CIA or the NSC.

4. Covert Operations and International Law.

This paper has not dealt with the scope of the authority of a nation to pursue foreign policy objectives by the use of covert operations. It also does not touch on the issue of whether some of the reported instances of the use of covert operations violate treaties or resolutions of the United Nations. However, we have expressed the view that international law should not be the basis for determining the legality of foreign covert operations to the exclusion of statutory and Constitutional considerations which are part of our domestic law. This view would seem to apply also to foreign intelligence collection activities.

5. Reorganization of the Civilian Intelligence Community.

It is apparent from our study of the legal problems in reorganizing the civilian intelligence community that many of the administrative obstacles to improving the efficiency of the national

intelligence operation cannot be overcome without Congressional action. Any attempt by the President to vest in a new appointee authority that has already been delegated to a specific person or body under the National Security Act or any effort to reallocate duties already assigned by statute would be contrary to the Act and also may constitute an executive reorganization requiring legislation. 10/

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10. Reorganization under the procedure of the Executive Reorganization Act ended on April 1, 1973. 5 U.S.C. 901, 905.

III. SUMMARY OF CONCLUSIONS.

A. Authority for Activities Relating to the Collection of Foreign Intelligence.

1. The authority of the President to collect intelligence in times of war and national emergency is implied from his Commander-in-Chief power, supplemented by his authority to faithfully execute the laws. This authority needs no independent Congressional grant to support it.

2. The President also would appear to have authority to collect intelligence, independent of a Congressional grant, when necessary or appropriate in carrying out any of his other enumerated powers or powers which are implied from the nature of his responsibilities, such as the conduct of foreign affairs.

3. Nowithstanding the existence of independent authority in the President to conduct intelligence activities, Congress has concurrent jurisdiction to legislate in the broad field of foreign affairs and, therefore, when it does legislate, the President is subject to such legislation. Any objection by the President would have to be based on the claim that concurrent jurisdiction does not exist and the legislation encroaches upon Presidential powers in violation of separation of powers.

4. Under the National Security Act and amendments thereto, the CIA, DCI, NSC and the President are limited by the provisions of that Act in the conduct of intelligence activities and any

actions which are inconsistent with the Act would be invalid and violate the separation of powers.

5. The DCI has plenary authority to protect intelligence sources and methods. This authority may be exercised in a quasi-legislative manner, but it may not be exercised in a manner which would violate the prohibitions against the use of law enforcement powers or involvement in internal security functions.

6. To the extent that foreign covert activities are used solely in connection with the collection of intelligence or the protection of sources and methods, such activities appear to come within the authority of the NSA.

B. Authority Relating to Covert Operations.

1. The President has inherent authority under the Constitution, independent of any grant of legislative authority, to authorize covert activities involving the use of political, economic, or military force against a foreign government or its leaders --

(a) In times of war or national emergency under his powers as Commander-in-Chief and his responsibilities for executing the laws; and

(b) To a limited extent, in times of peace under his residual authority as chief executive to take appropriate action when confronted with foreign threat to the security of the United States.

2. Although there are differences of opinion, it is doubtful that CIA was intended to have authority under the NSA to implement foreign policy by the use of covert means targeted against foreign elements.

3. The use of the CIA by the President or the NSC for conducting covert activities unrelated to the collection of intelligence and prior to the enactment of the Foreign Assistance Act of 1974 is not supported by the provisions of the National Security Act or its legislative history.

4. In the enactment of the Foreign Assistance Act of 1974, Congress expressly recognized, and, by implication acquiesced in, the authority of the President to authorize covert operations subject to a finding that the operation is important to the national security and a report of such finding is submitted to the Congress.

5. The theory that the President has unrestricted sovereign power to authorize covert operations as long as they do not violate international law cannot be supported.

C. Limitations on the Reorganization of the Civilian Intelligence Community.

1. The President can add to or change those duties of the Director of Central Intelligence (DCI) which would not amend the National Security Act (NSA) and which are within the range of duties that can be implied from 50 U.S.C. 403(d). Such changes may be initiated by the National Security Council (NSC) or the President through the Council.

2. The appointment of a senior intelligence advisor, coordinator, or other assistant to aid the President is a valid exercise of Presidential authority provided that the duties and functions assigned to such appointee do not conflict with those

expressly assigned by the NSA to the NSC or the CIA.

3. The President can direct the NSC to perform additional functions and duties provided that they do not conflict with the advisory role of the Council and are otherwise consistent with the provisions of the NSA.

4. The President should work through the NSC in directing the creation of additional advisory committees to aid the work of the CIA and the NSC. The President's own advisory committees can perform advisory activities which parallel the work of the NSC but such committees cannot usurp the management and supervisory functions the NSA directs the Council to perform.

IV. DETAILED ANALYSIS OF ISSUES.

A. Authority for Activities Related to the Collection of Foreign Intelligence.

1. Presidential Powers Generally.

"Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 1/ This statement, made by Mr. Justice Jackson in his concurring opinion in the Youngstown case, describes the fundamental nature of Presidential powers and points to the problem in attempting to draw precise lines between Presidential and Congressional powers. In this case he described the powers of the President as falling into three broad categories.:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances and in these only, may he be said ... to personify the federal sovereignty.
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> "2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

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1. 343 U.S. 579, 635 (1952)

> "3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 2/

This analysis of the interaction of Presidential and Congressional powers offers some guidance in determining the scope of such powers in the field of foreign intelligence within the framework of the National Security Act.

2. Authority to Collect Foreign Intelligence.

The President's authority to collect intelligence during war is unquestioned. The authority is implied in the power of the President as Commander-in-Chief of the armed forces. Totten v. United States, 92 U.S. 105, 106 (1875). Because of the need for accurate and reliable intelligence to enable the President to carry out his responsibilities for anticipating outside threats to our national security and conducting foreign affairs on a day to day basis, the collection of intelligence under conditions other than war or national emergency also seems clearly justified. These powers aid the President in the conduct of foreign affairs and in the preparations to meet potential threats to our national security. In commenting upon the President's authority as Commander-in-Chief

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2. Id. at 635-38

and in conducting foreign affairs, the United States Court of Appeals for the Third Circuit, in United States v. Butenko, 3/ pointed to the importance of the President having information to assist him in making an informed judgement in carrying out his responsibilities. "Decisions affecting the United States' relationship with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries." In United States v. Nixon, 4/ the Supreme Court recognized this broad concept of executive power in commenting on the Presidential power of executive privilege. The Court stated that "certain powers and privileges flow from the nature of enumerated powers" and as such have "constitutional underpinnings." 5/

Although the President has inherent authority to collect foreign intelligence, this authority is not exclusive. There is no doubt that Congress has the authority to legislate the administrative and organizational framework for the conduct of intelligence activities. 6/ To provide this framework, Congress enacted the National Security Act of 1947 establishing the National Security Council and the CIA. To the extent the National Security Act has legislated with

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3. 494 F. 2d 593 (3rd Cir. 1974)

4. 418 U.S. 683 (1974)

5. Id. at 705-06

6. Congress has the power under the "necessary and proper" clause to limit Presidential authority in foreign affairs. U.S. Constitution

respect to intelligence activities, the President is limited. However, he is not limited by functions or activities not embraced by the Act and which can be supported under his independent authority as President under Article II of the Constitution.

3. Authority Under the National Security Act.

Under the National Security Act, the CIA is authorized to correlate, evaluate and disseminate intelligence information derived from other intelligence agencies of the Government. 7/ In the performance of this function, the Agency is authorized to require the submission by other agencies and departments of information affecting national security. 8/ The CIA is also authorized to perform services of common concern for the benefit of other intelligence agencies, 9/ and other intelligence functions and duties affecting national security as the National Security Council may direct. 10/ In addition, the Director of Central Intelligence, under the direction of the National Security Council is given the responsibility for the protection of intelligence sources and methods. 11/ To delineate the responsibilities of the CIA in the foreign intelligence field

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Art. I, § 8; cf. Zweibon v. Mitchell, No. 73 - 1847 (D.C. Cir. June 23, 1975) slip op. at 825, 880 n. 228.

7. 50 U.S.C. 403(d)(3) (1964)

8. 50 U.S.C. 403(e) (1964)

9. 50 U.S.C. 403(d)(4) (1964)

10. 50 U.S.C. 403(d)(5) (1964)

11. 50 U.S.C. 403(d)(3) (1964)

and the FBI in the domestic field, the Act contains a specific prohibition against the utilization of police, subpoena, and law enforcement powers, or the performance of internal security functions. 12/

Conspicuous by its absence is the "collection" function. This function is not readily implied from correlation, evaluation, or dissemination, but it is clear that Congress intended the "collection" function to be included in the Act. 13/ The legislative history is also clear that the CIA was limited to foreign intelligence activities with the possible exception of such activities relating to its housekeeping responsibilities and the protection of its sources and methods.

The legislative history of the NSA disclosed the concern of several witnesses for the need of a central collection operation for foreign intelligence. In addition the language of the Act concerning

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12. Id.

13. See Hearings on S. 758 Before the Armed Services Committee, 80th Cong., 1st. Sess. at 491-501, 469; H.R. Rep. No. 2734, 79th Cong., 2nd Sess. (1946) (Includes recommendation that collection authority be withheld, but prohibition dropped in later drafts); S.B.L. Penrose, Jr., Collection of Background Papers on Development of CIA (15 May 1947); Report, Commission on CIA Activities Within the United States (hereinafter, Rockefeller Commission Report) at 59. The authority for collection would probably fall under the "functions and duties" section, 403(d)(5), see Note 16 infra., although § 403(d)(4) providing authority for performance of "services of common concern" could also be used. Walden, "The CIA: A Study in the Arrogation of Administrative Powers", 39 Geo. Wash. L. Rev., 66, 69 (1970).

"additional functions and duties" 14/ was taken directly from the Presidential order establishing the Central Intelligence Group (CIG). A key witness testified that he interpreted the language of the order to include collection activities. 15/ For Congress to use the same langauge in the act as used in the order indicates strongly that the CIA was intended to have authority to collect intelligence. 16/ The practice of CIA performing collection activities since its inception leaves little doubt that the collection function is within the CIA's authority. 17/

4. Restrictions on Executive Authority.

Although delegation of authority for the President's use of the CIA is broad, there are certain provisions contained in the NSA which limit the Executive Branch in conducting intelligence activities. The provision prohibiting the use of the CIA for internal security or police functions, along with the legislative history of

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14. "(It) shall be the duty of the Agency ...(5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. § 403(d)(5) 1964).

15. Hearings on S. 758 before the Armed Services Committee, 80th Cong., 1st Sess. at 491-501.

16. In an early version of the functions and duties of the proposed agency, an express prohibition was included forbidding collection activities. H.R. Rep. 2734, 79th Cong., 2nd Sess. (1946). In the final draft, however, that prohibition was excluded with the remaining language unchanged. 50 U.S.C. 403(d)(5) (1964)

17. The administrative practice of including collection within the Agency's authority provides strong support for the interpretation that that function falls under § 403(d)(5), especially if Congress,

the Act, make it clear that the Agency is limited in its conduct of intelligence activities within the United States, except possibly those of an overt nature relating to foreign intelligence 18/ or those which may be justified in order to protect intelligence sources and methods. 19/

In conducting intelligence activities, the Executive Branch also must keep within Constitutional limitations and any treaty limitations that may be applicable. 20/ The President has no inherent power to authorize intelligence collection functions in violation of Constitutional provisions. The extent of the latter restriction is unclear. Court decisions concerning Fourth Amendment requirements have dealt only with domestic aspects of national security and have left unanswered the question of the applicability of the Fourth Amendment to the foreign aspects of national security, i.e.,

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with knowledge of such an interpretation, acquiesces in it. United States v. Midwest Oil Co., 236 U.S. 459 (1915); see Saxbe v. Bustos 419 U.S. 65 (1974)

18. Rockefeller Commission Report at 48.

19. See Note 26, infra.

20. This discussion is not intended to judge the impact of a specific international obligation of the United States on the authority of the Executive to conduct intelligence activities. The vast number of treaties and other agreements to which the United States is party would make such an undertaking extremely time consuming and voluminous. It should be noted that treaties of which the United States is a party are the law of the land and, of course, any actions of the President must not be inconsistent with them. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). For a good discussion of espionage under international law, both in war and in peace, see Note, "Espionage in Transnational Law", 5 Vand. J. Trans. L. 434 (1972)

surveillance of agents or organizations operating in the U.S. but serving the interests of a foreign nation. 21/

Since Congress has acted in the foreign intelligence field, the President is limited in his use of CIA to the specific functions allocated to the Agency by the NSA. If Congress had intended to authorize the President to use CIA to carry out foreign policy generally, it could have so provided. There was, in the development of the Act, a concern over the President's apparent authority to assign functions to the Agency. This concern led to the specific assignment of CIA's functions in the statute. 22/ It would appear, therefore, that the President can only direct CIA in its assigned functions -- correlation, evaluation, dissemination, and collection 23/ -- and is not permitted to direct the performance of functions unrelated to foreign intelligence or not otherwise within the statutory grant.

5. DCI Authority.

The Act confers on the Director of Central Intelligence special authority in relation to the other elements within the intelligence community. It states, in effect, that to the extent recommended by the NSC and approved by the President, the intelligence collected by

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21. United States v. United States District Court, 407 U.S. 297 (1972); compare Zweibon v. Mitchell, No. 73-1847 (D.C. Cir. June 23, 1975), with United States v. Butenko, 494 F. 2d 593 (1974)

22. Hearings on S. 758 before Senate Committee on Armed Services, 80th Cong., 1st Sess. at pp 78, 87-89, 96-99 (1947); H.R. Rep. 961, 80th Cong., 1st Sess. pp. 3-4 (1947).

23. See text at Notes 13-17, supra.

other agencies and departments shall be made available to the DCI for correlation, evaluation and dissemination. 24/ This seems to provide the President with ample authority to require all agencies and departments which collect intelligence affecting national security to report such intelligence to the DCI for the purposes of correlation, evaluation and dissemination.

6. Protection of Sources and Methods.

The Act contains another provision relating to intelligence that should be touched upon. This provision places upon the DCI the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." 25/ This authority is plenary and gives the DCI authority to establish the standards and rules for protecting such sources and methods for all agencies and departments collecting intelligence affecting national security. There is no indication as to the extent which the DCI might go in carrying out this responsibility or as to the methods which may be put to use. Also, in view of the prohibitions against the use of police or law enforcement powers and involvement in internal security functions, it could appear that the DCI's authority for protecting intelligence sources and methods is limited to rule making in nature rather than investigatory or prosecutory, particularly in exercising authority domestically. 26/

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24. 50 U.S.C. § 402(e) (1964)

25. 50 U.S.C. § 402 (d)(3) 1964)

26. See generally Rockefeller Commission Report at 60-61, 165-70 (1975); Association of the Bar of the City of New York, The Central

7. Conclusions.

a. The authority of the President to collect intelligence in times of war and national emergency is implied from his Commander-in-Chief power, supplemented by his authority to conduct foreign affairs. This authority needs no independent Congressional grant to support it.

b. The President also would appear to have authority to collect intelligence, independent of a Congressional grant, when necessary or appropriate in carrying out any of his other enumerated powers or powers which are implied from the nature of his responsibilities such as the conduct of foreign affairs and faithfully executing the laws.

c. Notwithstanding the existence of independent authority in the President to conduct intelligence activities, Congress has concurrent jurisdiction to legislate in the broad field of foreign affairs and, therefore, when it does legislate, the President is subject to such legislation. Any objection by the President would

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Intelligence Agency: Oversight and Accountability, at 10, 11, 34 (1975); Heine v. Raus, 399 F. 2d 785 (4th Cir. 1968), on remand 305 F. Supp. 816 (D.C. Md.) aff'd, 482 F. 2d 1007 (4th Cir. 1969). The language of the Act granting protection of sources and methods responsibility to the DCI is so general as to be subject to substantial variation in interpretation. It would seem reasonable, however, that the general restrictions on the Agency would also apply, at least in spirit, to the DCI, thus delegating him an extensive responsibility abroad in relation to protection of sources and methods, while substantially limiting the delegation as to his responsibility in that area domestically.

have to be based on the claim that concurrent jurisdiction does not exist and the legislation encroaches upon Presidential powers in violation of separation of powers.

d. Under the National Security Act, the CIA, NSC and the President are limited by the provisions of that Act, and any amendments thereto, in the conduct of intelligence activities and any actions which violate the Act would be invalid and violate the separation of powers.

e. The DCI has plenary authority to protect intelligence sources and methods. This authority may be exercised in a quasi-legislative manner, but it may not be exercised in a manner which would violate the prohibitions against the use of law enforcement power or involvement in internal security functions.

B. Authority to Engage in Covert Operations.

Introduction.

The President's authority to order covert operations* must arise from his enumerated Constitutional powers or a statutory delegation by Congress. If acting under a grant from the Constitution, the President must draw upon his inherent powers or those implied from his express powers. If acting pursuant to legislative enactment, two statutes possibly provide the requisite authority: the National Security Act of 1947 1/ and the Foreign Assistance Act of 1974. 2/ This analysis will determine whether Presidential power exists to authorize covert operations and, if so, whether the CIA is empowered to engage in them. Unless so empowered, any Executive Order would be without authority and appropriate legislation would be necessary.

1. Constitutional Authority of the President to Authorize Covert Operations.

The determination of Presidential authority to formulate a peacetime policy of foreign covert operations requires an analysis of the powers granted in Article II. Specifically, this authority

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*For the purposes of this memorandum, covert operations embraces only those activities unrelated to collection of intelligence which are conducted on foreign soil against foreign nationals.

1. 50 U.S.C. 402

2. Public Law 93-559, § 32 (1974)

may arguably be implied from each of the following express powers. 3/

a. Responsibility to see that the laws are faithfully executed;

b. Commander-in-Chief power to command the armed forces; and

c. Grant of general executive power.

To claim authority under the first, the President must act pursuant to statute or treaty. There are only two statutes which could be interpreted as conferring such authority: the National Security Act of 1947 and the Foreign Assistance Act of 1974 (see discussion on page 34 infra.).

The President may order covert operations under his Commander-in-Chief authority in time of war. 4/ However, in times of international tranquility, the President may be restricted to the collection of intelligence. Authority for covert operations would then arise from the need of the President, as Commander-in-Chief, to make informed decisions on deployment of forces to protect the national security. 5/

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3. Art. II, U.S. Constitution. This memorandum does not address any issues relating to international law. An analysis of covert operations and outstanding international agreements will be provided upon request.

4. Cf. Totten v. United States, 92 U.S. 106 (1875) and United States v. Curtiss-Wright, 299 U.S. 301 (1937) for the proposition that authority to order covert operations against the enemy in time of war is implied from the Presidential powers as Commander-in-Chief.

5. Ibid. See also Federalist No. 23 (Hamilton) and Federalist No. 48 (Madison), and Federalist No. 69 (Hamilton) for endorsement of strong Executive power in the area of foreign policy. Rostow, E., "Great Cases Make Bad Law: The War Powers Act", 50 Tex. L. Rev. 833, 864 (1972), Notes, "Congress, the President and the Power to Commit Forces to Combat", 81 Harv. L. Rev. 1771, 1777 (1968).

The last possible source of Presidential authority is the inherent or general "executive power". 6/ It could be interpreted to allow covert operations in peacetime as a means of implementing foreign policy. This executive power can be interpreted broadly to grant discretionary authority to the President to engage in covert operations limited only by Congress' power to declare war. 7/ A second interpretation would allow the President to engage in such operations, but subject to statutory restriction as well as Congress' enumerated powers. 8/ The third and most reasonable interpretation of executive power would make the President's actions subject to

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6. General executive power was recognized as a distinct enumerated power of the President under Art. II by the Supreme Court in United States v. Nixon 418 U.S. 683 (1974). See also Notes, "Congress, the President, and the Power to Commit Forces to Combat". 81 Harv. L. Rev. 1771, 1776 (1968.

7. An overly broad interpretation of United States v. Curtiss-Wright 299 U.S. 304 (1937), would grant the President, as holder of the general executive power, residual authority to go beyond his enumerated powers to take whatever measures he deems necessary to implement foreign policy. The Presidential power would be exclusive and plenary in foreign affairs; subject only to the Bill or Rights and Congress' enumerated powers (i.e., power to declare war). Under this broad view, the President would have almost total discretion to use covertoperations as an instrument of foreign policy regardless of existing statutes. See also Barry Goldwater, "The President's Constitutional Primacy in Foreign Relations and National Defense", 13 The Virginia Journal of International Law, 463, 475 (1975).

8. Art. I § 8, Necessary and Proper Clause; McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed 579 (1819). President must adhere to an expression of Congressional policy in an area of share responsibility. Youngstown v. Sawyer, 343 U.S. 579 at p.635-38 (1953)(Jackson Opinion). See also Note, "Presidential Power: Use and Enforcement of Executive Orders", 39 Notre Dame Lawyer 44, 49 (Dec. 1963); Reveley: "Presidential War Making: Constitution Prerogative or Usurpation?", 55 U. Va. L. Rev. 1243 (1969). Federalist No. 47 (Hamilton) pp. 312-15 (Mod. Library ed.). There are limits to the extent of statutory control (see N. 9 below).

statutory restriction except under those circumstances when he must conduct covert operations to eliminate a threat to the national security. 9/ As such, the range of permissible Presidential actions is necessarily circumscribed by the nature of the threat to the national security.

The President may, therefore, establish policy guidelines for covert operations for he does possess the requisite independent authority. However, this does not mean that the President can establish a policy of CIA-administered covert operations for that is a question of statutory rather than Constitutional interpretation.

2. Statutory Authority of the President to Engage the CIA in Covert Operations.

a. National Security Act of 1947.

Whether there exists authority for CIA covert activities involves analysis of both the authority vested in the National Security Council

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9. The President's power to eliminate the threats to the national security is not properly subject to statutory restriction because it is implied from his exclusive power as Commander-in-Chief as well as an integral aspect of his more general executive power. See generally Wiener v. United States, 357 U.S. 349 (1958); Myers v. United States, 272 U.S. 52 (1926); Muskrat v. United States, 219 U.S. 346 (1911); Federalist No. 48 at pp. 321-23 (Mod. Library ed.). The scope of Presidential discretion is governed by what is practically necessary under the particular circumstance. See Federalist No. 72 at pp. 468-69 (Mod. Lib. ed. 1937). Rostow, "Great Cases Make Bad Laws: The War Powers Act", 50 Tex. L. Rev. 833, 864 (1972); Notes, "Congress the President and the Power to Commit Forces to Combat", 81 Harv. L. Rev. 1771, 1785 (1968); Reveley, "Presidential War Making: Constitutional Prerogative or Usurpation", 55 U. Va. L. Rev. 1243, 1257-65 (1969); Madison, Notes of the Debates in the Federal Convention of 1787, pp. 475-76 (Ohio Univ. Press ed. 1966) - (as cited in 48 Chi. Kent L. Rev 13, pp. 131-32) (1971). Although Presidential discretion

(NSC) and the President under the National Security Act (NSA).

The Act describes the function of the NSC as that of making assessments and recommendations to the President regarding matters relating to the formulation of foreign policy. 10/ In the provisions stating the role of the NSC, no independent operational authority is conferred. 11/ The NSC acts primarily in an advisory capacity. Whatever independent operational authority exists must be implied from those sections concerned with the functions and duties of the CIA. 12/ As such, the NSC is limited under the Act to instructing the CIA in the performance of those ministerial tasks necessary for the production of more accurate foreign policy assessments and recommendations. Covert operations do not appear to fall within this class and, therefore, may not be authorized by the NSC without Presidential approval.

Under the NSA the President may utilize the NSC as an instrument of his Consititutional powers. 13/ The NSA did not purport to delegate to the President any additional authority in

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when dealing with threats to the national security is broad, he may not act under a colorable assertion thereof. Cf. United States v. Nixon, 418 U.S. 683 (1974). Nor can he take actions which amount to a usurpation of Congress' power to declare war. See gen. War Powers Act of 1973, Hse. Rep. 93-287 on H.J. Res. 542, Committee on Foreign Affairs, 93rd Cong. 1st Sess. (1973)

10. 50 U.S.C. § 402(a), 402(b)(1)(2)

11. 50 U.S.C. § 401, 402

12. 50 U.S.C. § 403(d); 403(d)(5)

13. 50 U.S.C. § 402(6)

the area of foreign policy. 14/ Rather, the Act recognized and preserved existing independent Executive authority, 15/ and established a statutory framework for its implementation to which the President must adhere. 16/

Assuming arguendo that the President does possess the constitutional authority to conduct covert operations, he may

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14. 50 U.S.C. § 402(d), 402(b). Note that NSC is an advisory body. Moreover, 50 U.S.C. 403(d) incorporated the CIA functions and duties as stated in the Presidenital Directive of Jan. 22, 1946, 3 CFR 1080 (1943-48 Comp.)

15. Art. II, U.S. Constitution. Particularly the general executive power and Commander-in-Chief clauses.

16. Congress may prescribe the necessary and proper means for the execution of Presidential powers. Congressional action is unconstitutional only where it limits Presidential power rather than merely providing a means for its execution. (See Notes 8 and 9). See also Zweibon v. Mitchell No. 73-1847 at p. 880, Note 228 p. 228 (1975). For the proposition that under the NSA the CIA was to be limited to specific functions and duties see: (1) Memorandum for the Record by Lt. Gen. H. Vandenberg, Proposed Legislation for CIG, Chief Legislative Liaison Division. (2) Hse. Rep 2734, 79th Cong. 2nd Sess (1946). (3) Sen Rep. 1327, 79th Cong. 2nd Sess (1946) (4) Hse Rep. 961, 80th Cong. 1st Sess., pt. 3 (1947). (5) Hearing on H.R. 2319 before Hse. Comm. on Expenditures in the Executive Departments, 80th Cong. 1st Sess, p. 170 (1946) (colloquy between Rep. Brown and Secretary Forrestal. (6) Hearing on H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts., pp. 456-58 (1946) (statement of Brig. Gen. Merritt A. Edison) (7) Hearings on H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts., pp. 166-81 (1946) (colloquy between Rep. Harness and Adm. Sherman) (8) Hearings on S. 758 before Senate Committee on Armed Services, p. 555 (1946) (statement of Lt. Col. Riddell) (9) Hearings on S. 758 before Sen. Comm. on Armed Services, 80th Cong, 1st Sess., pp. 437-39 (1946) (statement of J.J. Bracken). For the proposition that CIA was to have maximum flexibility in its functions and duties see: (1) Memorandum to Gen. Magruder from Commander Donovan, General Counsel, OSS, 23 Jan. 1946. (2) Hearingson H.R. 2319 before House Comm.on Exp. in Exec. Depts., p. 228 (1946) (statement of Gen. Norstad).

direct the NSC to establish "executive action" groups subject to appropropriate guidelines as approved by him. However, with respect to the utilization of Congressionally created agencies, he is limited to the functions and duties they are assigned by statute. 17/ Consequently, the President's use of the CIA must fall within the ambit of the applicable provisions of the NSA.

Under the NSA, the primary function of the CIA is to collate, evaluate and disseminate foreign intelligence.18/ The motivation for the creation of the CIA was not to provide the President with an instrument of subliminal warfare, but to assure him access to an organized body of information necessary for making major foreign policy decisions. 19/

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(3) Hearings on H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts., pp. 111-14, pp. 119-21 (1946) (colloquy between Rep. Busbey and Secretary Forrestal).

17. Id.

18. 50 U.S.C. 403(d)(1) - (4) and p. 18 of text.

19. (1) Sen. Rep. No. 239, 80th Cong., 1st Sess. p. 2, 5 June 1947. (2) Hse. Rep. 961, 80th Cong. 1st Sess, 16 June 1947, p. 310. (3) Sen. Rep. 1327, 79th Cong., 2nd Sess. (1946). (4) Thomas Address, Congressional Record, 14 March 1947, p. 2139. (5) Hearings on H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts., pp. 166-81 (1946) (statement of Vice Adm. F. Sherman). (6) Hearings on H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts, 13 May 1947, (statement of Gen. Carl Spaatz). (7) Hearings on S. 758 before Sen. Comm. on Armed Services, 80th Cong. 1st Sess. (Mar 18-May 9, 1947) (statement of Adm. Chester Nimitz). (8) Hearings on S. 758 before Sen. Armed Services Comm, 80th Cong., 1st Sess. pp. 491-501 (1947) (statement of Lt. Gen. H. Vandenberg). (9) Hearings on S. 758 before Sen. Comm. on Armed Services, 80th Cong., 1st Sess., pp 548-555 (1947) (statement of Lt. Col. Riddell). (10) Presidential Directive, 1/22/46 (3 CFR 1080). (11) See also floor debates: Senate: 93 Cong. Rec. pp. 8466, 8677, 9671; House: 93 Cong. Rec., pp. 9565, 9569, 9573, 9379, 9581, 9582, 9590, 9576. (12) See

The only provision of the NSA that could be interpreted to allow CIA covert operations is § 102(d)(5). 20/ Under this provision the CIA may be charged with "other functions and duties relating to intelligence affecting the national security." "Relating to intelligence" can be interpreted to mean "relating to the collection of intelligence." 21/ Covert activities not related to collection (e.g., acts of economic or political subversion) are, therefore, arguably outside the scope of § 102(d)(5). Moreover, there are no references to these activities in the floor debates or Committee reports. There are only four references made to covert operations in the entire Hearings Record. 22/

To summarize, neither the provisions nor the legislative history of the NSA indicate that the CIA was to engage in operations not related to the collection of intelligence. 23/ Therefore, it

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also N.Y. Bar Association Study, "The CIA Oversight and Accountability", p. 14. (13) Walden, "The CIA: A Study in the Arrogation of Administrative Powers", 29 Geo. Wash L. Rev. 66, 84 (1972)

20. 40 U.S.C. § 403(d)(5)

21. See (A), Note 14, supra.

22. (1) Statement of Allen Dulles, Sen. Comm. Hearings on S. 758, p. 528 (1947). (2) Statement of Lt. Col. Ridell, Sen. Comm. Hearings on S. 758, p. 555. (3) Colloquy between Rep. Busbey and Secy. Forrestal, Hse. Comm. Hearings on H.R. 2319, p. 120 (1947). (4) Colloquy between Rep. Brown and Gen. Vandenberg, Hse. Hearings on H.R. 2319 (27 June 1947)

23. Debates: Senate - 93 Cong. Rec. pp. 8299, 8308, 8320, 8493, 8494, 9496-97, 8500-01. House - 93 Cong. Rec. pp. 9397. 9400, 9403-04. 9412-13, 9419, 9421. 9430. 9443, 9447. Reports: Hse. Rep. 961 and Sen. Rep. 239, 80th Cong., 1st Sess. (1946). Cong. Rep. on S. 758

seems clear that any Presidential action directing the CIA to undertake covert activities other than those related to the collection of intelligence, cannot be based solely on the NSA.

b. Foreign Assistance Act.

Section 662 of the Foreign Assistance Act of 1974 24/ requires the President to make a finding that any proposed CIA covert operation not solely related to the gathering of necessary intelligence, is "important to the national security" and then report such finding to the Congress.

Two interpretations may be given to Section 662 concerning the existence of Presidential authority to use the CIA for the performance of covert operations. This provision can be construed as either an affirmative grant of power to the President or a limitation upon presumed Presidential authority 25/ to engage the CIA in covert operations.

The legislative history provides support for both of these interpretations. In the House debates, statements were made to the effect that Section 662 was intended to permit CIA "to engage in non-

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80th Cong. (Hse. Rep. 1051, 80th Cong. 7/24/47 at pp. 17, 18, 19). Hearings: On H.R. 4219 before Hse. Comm. on Exp. in Exec. Depts. On H.R. 2319 before Hse. Comm. on Exp. in Exec. Depts., 80th Cong., 1st Sess. (1947). On S. 758 before Sen. Comm. on Armed Services, 80th Cong., 1st Sess. (1947)

24. P.L. 93-559, § 32 (1974).

25. Any pre-existing Presidential authority must be based on § 102(d)(5) of the NSA (see text p.33). Section 662 of the Foreign Assistance Act could be the recognition by Congress that 102(d)(5) was originally

intelligence gathering activities 26/ and provide "a further statutory basis for the implementation of foreign policy-related operations of the CIA." 27/ Conversely, there were also statements made in House debates indicating that the Section was to "limit the instances in which foreign policy is in essence being created by the President, the CIA, and four committees of Congress" 28/ and "to allow for closer supervision of CIA activities." 29/

However, whether Section 662 is an affirmative grant of power to the President or limitation upon Presidential authority to engage the CIA in covert operations is unimportant. The mere presumption by the Congress of Presidential power in the field of foreign affairs is the equivalent of an implied delegation of the requisite statutory authority. 30/ Moreover, this interpretation

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intended to allow the President to delegate his general executive or inherent power to the CIA. In fact, the Senate version (S. 3394) referred to acts taken pursuant to 102(d)(5) of the NSA. See p. S 21413 Cong. Rec. (1974)

26. Cong. Rec., Dec. 11, 1974, p. H. 11651-2

27. Id. at p. 2

28. Id. at p. 2

29. Id. at p. 2

30. See United States v. Curtiss-Wright, 299 U.S. 301 at p. 302 (1937). See also Jackson opinion in Youngstown v. Sawyer, 343 U.S. 579 at p. 635 (1953) wherein he distinguishes Curtiss-Wright and also notes that the President's powers are at their fullest when Congress has either implicitly or expressly authorized the exercise thereof. Cf. Notes 5, 7, 9. Note also that the standard of "important to

of Section 662 appears consistent with the underlying intent of the NSA in that the latter did not disturb the independent power of the President to safeguard our national security. Consequently, the Foreign Assistance Act provides the President with the requisite authority to engage the CIA in covert operations, such operations to be authorized in accordance with the procedures of the NSA.

3. Conclusions.

a. The President has inherent authority under the Constitution, independent of any grant of legislative authority, to authorize covert activities involving the use of political, economic, or military force against a foreign government or its leaders --

(1) In times of war or national emergency under his powers as Commander-in-Chief and his responsibilities for executing the laws; and

(2) To a limited extent, in times of peace under his residual authority as chief executive to take appropriate action when confronted with a foreign threat to the security of the United States.

b. Although there are differences of opinion, it is doubtful that CIA was intended to have authority under the NSA to implement foreign policy by the use of covert means targeted against foreign elements.

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national security" set forth by Section 662 may include actions broader than those necessary to thwart threats to the national security. Therefore, Section 662 may constitute a Congressional enlargement of Presidential executive power within the broad confines of Curtiss-Wright. It should be noted also that there is support for the view that implied authorization for a specific operation is not effective in an appropriations bill unless the Congress is fully knowledgeable of the facts. Cf. Holtzman v. Schlesinger, 484 F. 2d 1307, 1316 (C.C.A. 2d 1973) involving the secret bombings of Cambodia.

c. The use of the CIA by the President or the NSC for conducting covert activities unrelated to the collection of intelligence and prior to the enactment of the Foreign Assistance Act of 1974 is not supported by the provisions of the National Security Act or its legislative history.

d. In the enactment of the Foreign Assistance Act of 1974, Congress expressly recognized, and, by implication acquiesced in, the authority of the President to authorize covert operations subject to a finding that the operation is important to the national security and a report of such finding is submitted to the Congress.

e. The theory that the President has unrestricted sovereign power to authorize covert operations as long as they do not violate international law cannot be supported.

C. Limitations on the Authority to Reorganize the Civilian Intelligence Community.

Introduction

With the passage of the National Security Act of 1947, Congress asserted its legislative authority over the structuring of the civilian intelligence community. The Act provided for the administrative and functional framework within which intelligence activities were to be performed by the CIA, designed to replace the CIG (Central Intelligence Group). The National Security Council was established as the new supervisory body, replacing the NIA (National Intelligence Authority).

Any administrative changes substantially affecting the present statutory framework for conducting intelligence activities could not be implemented unless approved by Congress. It should be noted, however, that because of the vagueness of certain provisions of the Act, coupled with the broad discretionary authority vested in the President to direct the activities of the NSC, the restrictive effect of the statutory limitations is considerably diminished.

1. Reconstituting the Duties of the Director of Central Intelligence.

a. Existing statutory responsibilities.

The NSA has elevated the role of the DCI to that of a senior intelligence official whose responsibilities include coordinating the intelligence activities of all the intelligence services as well as the management and direction of the CIA. (See CHART A at the conclusion of this section.) The CIA occupies a status which is

in effect superior to the other established intelligence agencies. The function of the Agency in this context is to centralize the intelligence information and activities so as to provide the NSC with a comprehensive and coordinated intelligence product.

The DCI's statutory duties and responsibilities include:

(1) The coordination of the intelligence community activities as the head of the CIA and as the NSC's senior intelligence advisor. 50 U.S.C. 403(d) (1)-(5) (1964).

(2) Subject to the approval of the President, the right to inspect the intelligence products of all other intelligence services both military and civilian; the DCI must request in writing intelligence relating only to national security from the FBI. 50 U.S.C. 403(e) (1964).

(3) The protection of intelligence "sources and methods" for the benefit of all of the intelligence services under the direction of the NSC. 50 U.S.C. 403(d), (g) (1964).

(4) The joint responsibility with the Attorney General and the Commissioner of Immigration to determine which essential aliens can be permitted to gain residence in the U.S. if in the interest of national security or intelligence needs. 50 U.S.C. 403(h) (1964).

(5) The appointment of advisory committees. 50 U.S.C. 405(a) (1964).

b. Adding additional duties

Although the DCI has a broad range of coordinating functions, the

NSA limits the use of the CIA and the DCI to the statutory duties and responsibilities contained therein. If the President were to direct changes in the functions of the DCI which are not authorized by statute, he must rely on Executive powers which are the least tenable, notwithstanding his extensive authority to conduct foreign affairs. 1/

1. Senator Goldwater's argument that the President has broad authority to appoint and rely on whichever advisors he wishes reflects the view that the Executive Branch retains an almost unlimited power in the area of foreign affairs. Goldwater, "The President's Constitutional Primacy in Foreign Relations and National Defense," 13 Va. J. I. L. 463, 475 (1973). Goldwater's arguments are consistent with the very liberal reading of the Curtiss-Wright case which supporters of the Executive's power interpret to give the President an unencumbered authority in the conduct of "external" affairs. United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936). Alexander Bickel, in contrast, views the "necessary and proper" clause of the Constitution as the power of Congress to limit Presidential action in foreign affairs. Bickel, "Congress, the President, and the Power to Wage War," 48 Chi.-Kent L. Rev., 131, 140 (1971). In a note on executive orders, the position is taken in line with Bickel's thinking that Presidential directives are limited by the declarations of Congress in statutes like the 1947 Act. Note, "Presidential Power: Use and Enforcement of Executive Orders," 39 Notre Dame Law. 44, 49 (1963). The best approach is to follow the analysis of Presidential power made by Mr. Justice Jackson in his concurring opinion in the Youngstown case. Using the executive powers model which Jackson establishes as the basis for his analysis, the President, in reorganizing the intelligence community, must rely upon powers which, when exercised, run contrary to the will of Congress in this area of concurrent jurisdiction. Jackson finds this particular variety of Presidential power the least defensible. Referring to the steel mill seizure by Truman, Jackson said this type of power is "most vulnerable to attack and in the least favorable of possible constitutional postures." Youngstown v. Sawyer, 343 U.S. 579, 640 (1952). Justice Frankfurter, commenting on the President's duty to faithfully execute the laws, concluded that the duty does not transgress the laws as they exist "or require him to achieve more than Congress sees fit to leave within his power." 343 U.S. at 610.

Thus, it is difficult to support the President's reliance on inherent Constitutional authority as the basis upon which to initiate organic changes in the structure of the office of the DCI. 2/ The passage of the NSA represents the exercise of Congressional power in an area of concurrent jurisdiction with the President and the Act thereby restricts changes to those which would not circumvent the provisions set forth in the NSA. 3/ If, for example, the President were to remove the DCI from the supervision of the NSC, the change would be inconsistent with the organizational framework established by Congress. 4/ This

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2. The argument has been advanced that the President's exercise of his wartime powers to create the OSS had the residual effect of vesting within the Executive office the power to alter or reassign the duties of the civilian intelligence community set up by the 1947 Act. The President can initiate executive action in those areas of concurrent authority with Congress where the Congress has failed to enact legislation. As Mr. Justice Jackson explained in Youngstown, "In this area any actual test of power is likely to depend on the imperatives of events ... rather than on abstract theories of law." 343 U.S. at 637. Thus, the nature of the Presidential initiative is often that of a contingent response where immediate needs require that a particular void be filled. President Truman's secret directive in January 1946 creating the Central Intelligence Group was issued only six months prior to the committee hearings dealing with legislative proposals which eventually resulted in the NSA of 1947. But once the Congress enacts legislation in an area of concurrent jurisdiction, the statute repeals those particular parts of executive directives which are inconsistent with the new legislation. Cf. Zweibon v. Mitchell, No. 73-1847 slip op., note 228 at 880 (D.C. Cir., June 23, 1975).

3. 50 U.S.C. 403(a), (d), (e), (1964)

4. The legislative history of the 1947 Act shows that the understanding of members of Congress, during testimony in committee hearings, was that the DCI and the Agency would work under the direction of the NSC. [Office of Leg. Counsel -CIA] "Legislative History of the Central Intelligence Agency" at 64 (1967) (classified SECRET).

type of restructuring would constitute a usurpation by the President of legislative power and would thus be subject to challenge unless approved by Congress either as a governmental reorganization plan or by amending legislation. 5/

Although the President's inherent power to restructure the office of the DCI is questionable, the NSA itself provides the Executive with a significant amount of discretion in initiating internal changes. Under section 403(a) of the Act the office of the DCI is organized under the NSC, and the Council, in turn, is established as an advisory body to the President on national security matters. Strictly applied, the statute, in effect forecloses direct Presidential control over the DCI insofar as the administration of the provisions of the Act are concerned. 6/ But the President indirectly controls the functions of the DCI in his role as chairman of the NSC, provided that the directives he initiates in the Council remain within the scope of the statute. The scope of the statute, though, is sufficiently broad to provide the President with a wide range of authority for utliizing the intelligence community as an advisory body. 7/

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5. The Executive Reorganization Act (50 U.S.C. 901, 905) expired on April 1, 1973. Consequently, the President must pursue Executive reorganization plans through the regular and more cumbersome legislative process which the Reorganization Act bypassed if Congress did not act upon the plan in 60 days.

6. "The Director (of CIA) reports, under the provisions of the statute, to the members of the National Security Council in the only corporate capacity in which the Council acts. In other words, the Council is a statutory Board of Directors for the CIA." Anderson, "The President and National Security", Atlantic Monthly, January, 1956; at 44.

7. 50 U.S.C. 402(a), (b) (1964).

As a practical matter, the difference between the issuance of a Presidental order to the DCI or requiring the NSC to initiate such a directive should not be an organizational deterrent impeding Presidential action. The DCI and the members of the NSC are Presidential appointees and, therefore, there should be no obstacle to Presidential management of intelligence activities, including those of the DCI. 8/ Apparently, this channel of authority established under the Act is intended to reflect the legislative view that a consensus management and control of the lower level intelligence staff and agencies provides the departments represented on the Council with a better means to secure information needed to advise both the President and the departments.

The direct supervision of the activities of the CIA by the NSC also provides an accountability factor which diminishes the potential for misuse of the Agency by the President or White House level officials. 9/ Moreover, a clear, orderly administrative conduit through which Presidential policy directives flow to the various levels of the intelligence community can augment the effectiveness of both the CIA and the NSC.

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8. Id., 402(a). The Act does provide for a Presidential designee to preside over NSC meetings but the same phrase is not included in 402(b). Thus, one would be hard pressed to construe 402(b), in light of the express power to designate someone to preside over NSC meetings, to imply a similar right to designate someone to exercise the President's powers to direct "other functions".

9. Recommendation (26) of the Rockefeller Commission report emphasizes that any high level channel between the White House and the CIA should involve the NSC. The recommendation was the result of the need to prevent abuses of the CIA similar to the ones apparent in the Watergate related cases and the break-in of the home of Dr. Ellsberg's psychiatrist and the preparation of the psychological profile on Dr. Ellsberg by Agency doctors. "Report to the President by the Commission on CIA Activities Within the United States" at 33 (1975).

c. The dual role conception

As an alternative to expanding the functions of the DCI in his present capacity, the President could appoint the DCI to an additional White House level post reviewing the activities of the entire intelligence community. Making the DCI the equivalent of a national intelligence advisor to the President is similar to the status of the present Secretary of State. There are strong political and practical objections to this dual role conception. It would create, for example, a possible conflict of interest in the use of political power if such an advisor were to favor civilian intelligence over military intelligence or vice versa. The extent of any conflict would depend upon what authority is vested in the advisor by the President. Less conflict would probably develop if the authority was limited to executive oversight. But if the advisor were assigned management responsibilities over the intelligence community, the conflict could become irreconcilable. 10/ In contrast with the DCI, the Secretary of State's direct responsibility to the President in either position he occupies, his advisory capacity, and the absence of an intermediate

10. Earlier internal studies examined various options for the reorganization of the office of DCI. The primary objection raised in opposition to the appointment of what is in effect an intelligence "czar" was the control of the military intelligence apparatus. This recurring conflict between the military establishment's needs and those of the civilian intelligence community reflects the fundamental distinction between the foreign affairs and war-making powers and the institutional rivalries which this Constitutional dichotemy facilitates in the executive departments.

supervisory body like the NSC eliminates most of the organizational problems which the DCI would confront in a dual role.

d. Appointing a separate intelligence adviser to the White House

A second alternative is the appointment of a senior intelligence advisor apart from the DCI and not responsible to the NSC. The advisor would assume the additional duties the President would have assigned to a senior intelligence officer like the DCI. In fact, the use of advisory personnel whose functions would either supplement or duplicate the work of the NSC or the DCI is not a novel practice. Past Presidents have relied greatly on informal but regularly attended meetings of special advisory groups or advisors to help formulate intelligence related policies and operations. While there would not be legal obstacles to the appointment of an independent White House advisor on intelligence matters, it would encounter the same type of political objections as in the above dual role conception. 11/ Also, the advisor's functions should be consistent with the Act.

2. Altering the Responsibilities of the National Security Council

Any changes in the duties and responsibilities of the National Security Council require a discussion of issues similar to those raised above. (See CHART B at the conclusion of this section.) The National Security Council is under the direct authority of the President and serves as the umbrella supervisory body over the intelligence community, filtering down the Presidential directives and assignments.

11. See Note 10 supra.

While the President has certain inherent powers over the conduct of foreign affairs, it is doubtful that he can delegate the use of such powers to a Congressionally created body unless the delegation is consistent with the broad outline of the NSC's statutory duties. Neither residual or independent powers exist in the Council other than the basic ministerial authority to perform the advisory function. The Council does have the equivalent of a derivative ministerial authority from the President by virtue of the broad statutory grant vested in him to direct the NSC's activities. In this respect, the organizational structure established by Congress in the NSA gives the President a significant amount of discretion in using the NSC in its advisory role. But despite the NSC's functional administrative utility, previous Presidents have found it desirable to rely on informal high level advisory committees. Professor Jerrold Walden's analysis of the administration of the CIA traces the development of this type of parallel advisory structure by reviewing the frequency of NSC meetings. He states, for example, that President Kennedy eliminated the regular meetings of the Council and President Johnson "virtually abandoned" the NSC (quoting a news magazine story), relying instead upon the "Tuesday Luncheon" group. 12/

The propriety in utilizing these so-called informal groups rather than pursuing the policy objectives through the NSC is questionable. To the extent that these groups supplant the role

12. Jerrold Walden, "The CIA: A Study in the Arrogation of Administrative Powers," 39 Geo. Wash. L. Rev., 66, 90 (October 1970).

of the NSC in the formulation of policies, possible conflicts under the Act could arise unless the President has authority to act independently. The formation of Presidential level advisory groups to supplement the work of the NSC is not inconsistent with the NSA. However, a transfer of duties to these groups which the statute expressly assigns to the NSC would violate the statutory scheme again unless the President can act independently.

3. Appointing of Advisory Committees

Both the President and the NSC have established advisory committees to assist the intelligence community. 13/ Section 405(a) of the Act provides that the DCI and the NSC "are authorized to appoint" the advisory committees they deem necessary to assist them in the execution of their advisory functions and duties. 14/ The President is not included in the authority conferred by this section of the Act. 15/ The President's authority to appoint committees to aid the NSC or the DCI must, therefore, be implied from his authority to direct the NSC.

13. These would include PFIAB, set up by Presidential Directive, and the various committees created by secret NSCID's or DCID's which aid the work of the NSC or the DCI like the NSCIC, IRAC, and the IC Staff.

14. 50 U.S.C. 405 (1964).

15. President Truman apparently circumvented the requirement that the NSC or the DCI, at the time, the Chairman of the Resources Board, appoint advisory committees they needed. Truman established the National Advisory Committee on Mobilization Policy by executive order to aid the National Security Resources Board. E.O. 101609, 15 F. R. 6901 (Oct. 13, 1960).

16/ The President's power is thereby procedurally limited in that it must be exercised through the NSC.

In contrast with the advisory committees established to facilitate the work of the NSC and the CIA, the President has the direct authority to appoint advisory panels to advise him on intelligence matters. An example of such a panel is the President's Foreign Intelligence Advisory Board (PFIAB) which advises the President on intelligence activities after examining the "objectives conduct, management and coordination of the various activities making up the overall national intelligence effort." 17/ However, as in the case of other delegations of Presidential authority to non-statutory bodies, any such delegations to PFIAB of functions or duties which have been expressly reserved by statute for a body like the NSC, would be contrary to the allocation of such functions and duties as set forth in the Act. 18/

16. Section 405 could be interpreted merely as a procedural provision, thus, not excluding the President from directly appointing advisory committees to aid the NSC and the DCI. The provision was probably enacted to facilitate the work of the NSC and the CIA and not to restrict the President from taking a direct and active role in helping to organize the then newly created civilian intelligence community. In contrast with the procedural nature of Section 405, Section 402, for example, is more substantive and the failure to include the President in direct CIA supervision reflects the Congressional intent to place the Agency under direction control of the NSC.

17. PFIAB was created in 1961 by President Kennedy, replacing the President's Board of Consultants on Foreign Intelligence Activities which was appointed by President Eisenhower in 1956. E.O. 10938, 26 F. R. 3951 (May 4, 1961). President Nixon changed PFIAB in 1969. E.O. 11640, 34 F. R. 5535 (March 20, 1969).

18. See generally Note 8, supra.

4. Conclusions

a. The President can add to or change those duties of the DCI which would not amend the NSA and which are within the range of duties that can be implied from 50 U.S.C. 403(d). Such changes may be initiated by the NSC or the President through the NSC.

b. The appointment of a senior intelligence advisor, coordinator, or other assistant to aid the President is a valid exercise of Presidential authority provided that the duties and functions of such an advisor do not conflict with those assigned by the NSA to the NSC or the CIA. However, the appointment of such an assistant to the President would be politically undesirable because it would increase the rivalry between the civilian and military intelligence services.

c. The President can direct the NSC to perform additional functions and duties provided that they are consistent with the advisory role of the Council and are otherwise consistent with the provisions of the NSA.

d. The President should work through the NSC in directing the creation of additional advisory committees to aid the work of the CIA and the NSC. The President's own advisory committees can perform advisory activities which parallel the work of the NSC but such committees should not usurp the management and supervisory functions the NSA directs the Council to perform.

CHART A: DCI'S FUNCTIONS IN THE INTELLIGENCE COMMUNITY

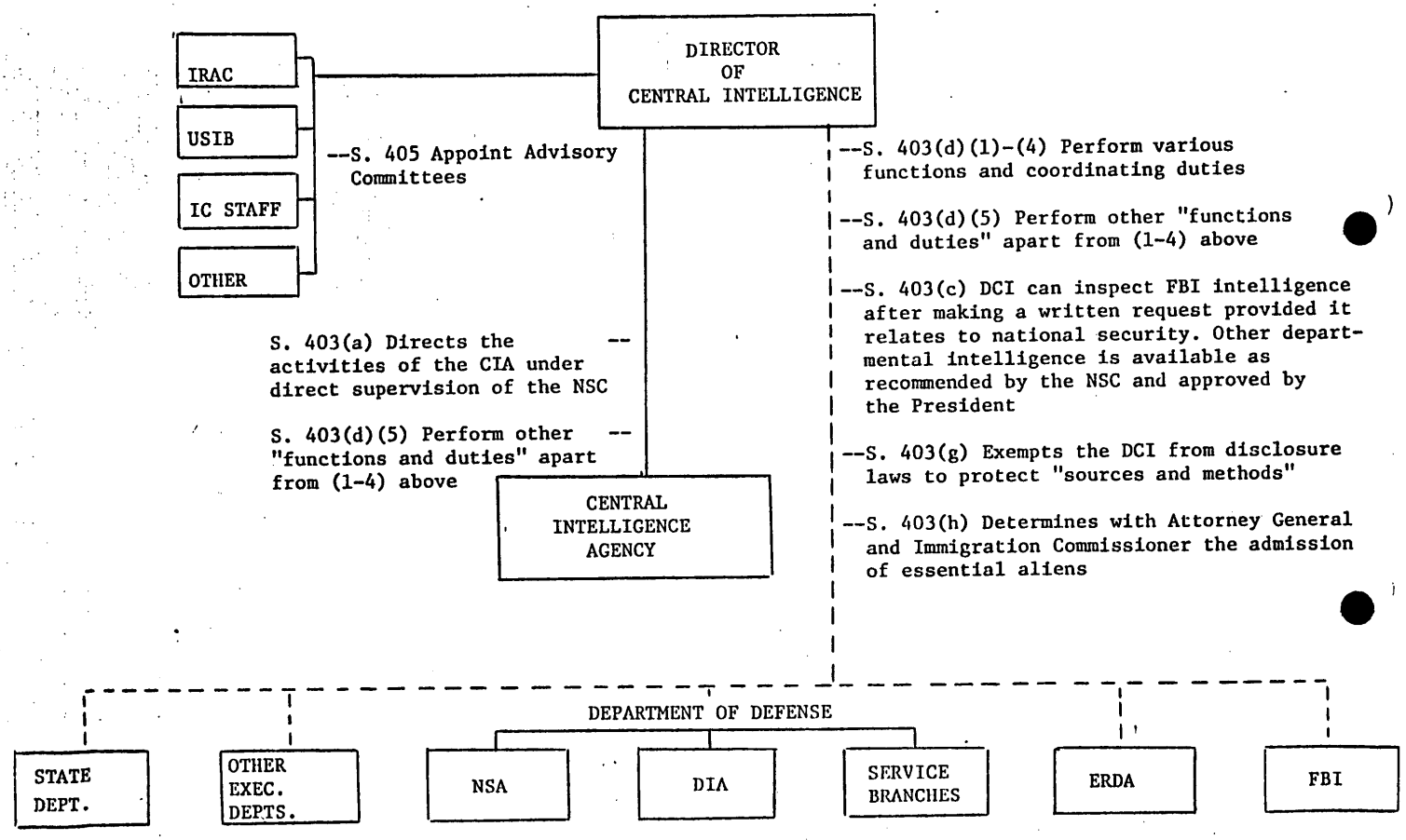
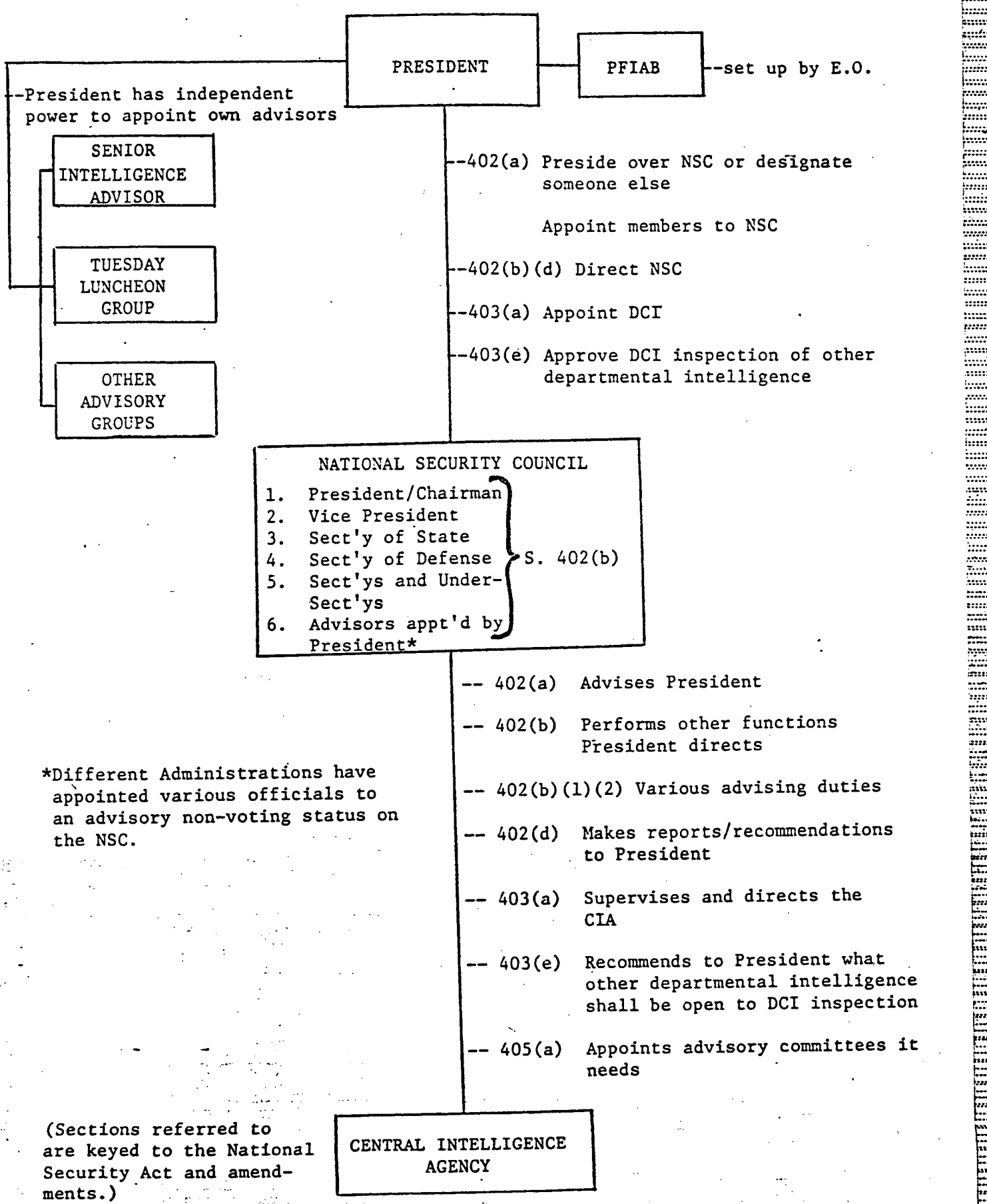


Chart B

THE PRESIDENT & THE NSC IN THE STRUCTURE OF THE INTELLIGENCE COMMUNITY



*Different Administrations have appointed various officials to an advisory non-voting status on the NSC.

(Sections referred to are keyed to the National Security Act and amendments.)